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U.S. Department of Justice

United States Attorney Eastern District of New York

GMP:BCR/AG F. #2009R01065 271 Cadman Plaza East Brooklyn, New York 11201

January 3, 2019

TO BE FILED UNDER SEAL

By ECF

The Honorable Brian M. Cogan United States District Judge United States District Court Eastern District of New York 225 Cadman Plaza East Brooklyn, New York 11201

Re: United States v. Joaquin Archivaldo Guzman Loera

Criminal Docket No. 09-466 (S-4) (BMC)

Dear Judge Cogan:

The government respectfully submits this letter in connection with the trial in the above-referenced matter. The government hereby moves <u>in limine</u> to preclude cross-examination regarding mental health issues related to a cooperating witness who has not yet testified. These issues do not bear on to the witness's ability to recall events or testify accurately. In light of these reasons and the Court's previous order granting the government's motion to preclude cross-examination of past mental health issues as to another witness, <u>see</u> Dkt. No. 415 at 6-7, the government respectfully requests that the Court preclude cross-examination on this topic.

I. Legal Standard

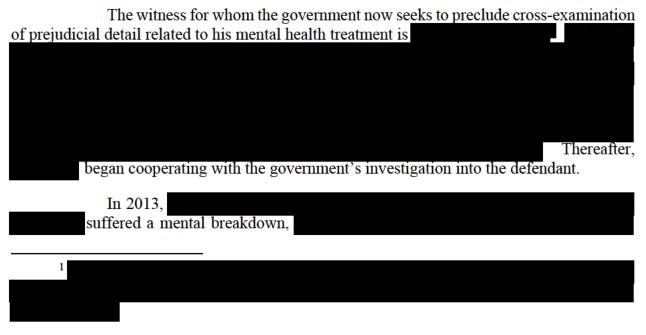
The scope and extent of cross-examination is committed to the sound discretion of the district court. <u>See United States v. Wilkerson</u>, 361 F.3d 717, 734 (2d Cir. 2004). The court may properly bar cross-examination that is only marginally relevant to a defendant's guilt or other issues before the court. <u>See United States v. Maldonado-Rivera</u>, 922 F3d. 934, 956 (2d Cir. 1990); see also Fed. R. Evid. 611 (stating that "court should exercise reasonable

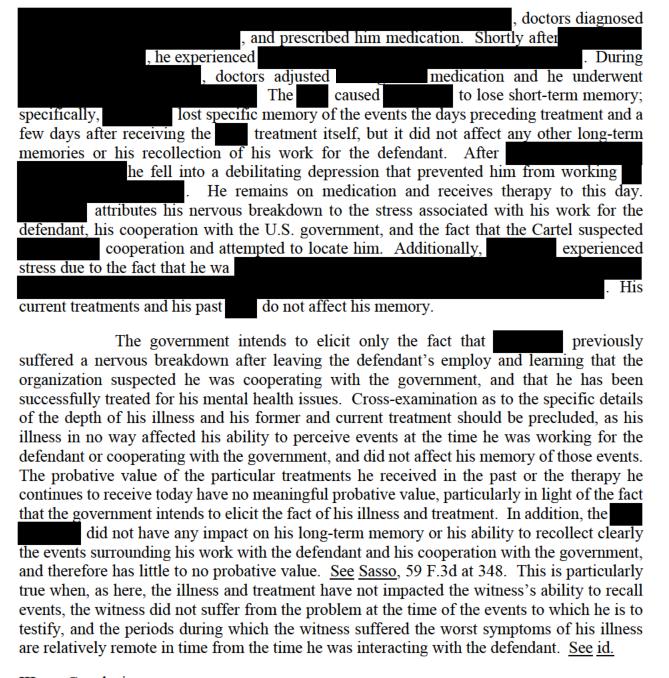
control . . . so as to . . . avoid wasting time[] and protect witnesses from harassment or undue embarrassment").

A "decision to restrict cross-examination will not be reversed absent an abuse of discretion." <u>United States v. Lawes</u>, 292 F.3d 123, 131 (2d Cir. 2002) (citing <u>United States v. Rosa</u>, 11 F.3d 315, 335 (2d Cir. 1993)). The Second Circuit has repeatedly upheld district courts' exercise of discretion in imposing reasonable limits on the subjects that may be inquired into on cross-examination. <u>See United States v. Rivera</u>, 971 F.2d 876, 886 (2d Cir. 1992) ("The court is accorded broad discretion in controlling the scope and extent of cross-examination.").

With respect to mental health issues, in particular, the Second Circuit has held that evidence related to a witness's psychological history may properly be limited on Rule 403 grounds even where the issues in question overlapped with the time about which the witness was to testify. See United States v. Sasso, 59 F.3d 341, 348 (2d Cir. 1995) ("In assessing the probative value of [psychological] evidence, the court should consider such factors as the nature of the psychological problem, the temporal recency or remoteness of the history, and whether the witness suffered from the problem at the time of the events to which she is to testify . . ."); Davidson v. Smith, 9 F.3d 4, 7 (2d Cir. 1993) (affirming district court ruling that evidence of the plaintiff's psychiatric institutionalization 15 years prior should be excluded under Rule 403).

II. <u>Discussion</u>





III. Conclusion

For the foregoing reasons, the Court should preclude cross-examination of as to his mental health issues.

IV. Partial Sealing is Appropriate

Pursuant to the protective order in this case, the government respectfully requests permission to submit this letter partially under seal. See Dkt. No. 57 \P 8. The description of the witness's role and responsibilities, as well as particularized details as to his mental health and treatment, could lead the defendant's criminal associates to identify him in advance of his testimony.

Thus, partial sealing is warranted because of the concerns regarding the safety of potential witnesses and their families, and the danger posed by disclosing the potential witnesses' identities and their cooperation with the government. See United States v. Amodeo, 44 F.3d 141, 147 (2d Cir. 1995) (need to protect integrity of ongoing investigation, including safety of witnesses and the identities of cooperating witnesses, and to prevent interference, flight and other obstruction, may be a compelling reason justifying sealing); see Feb. 5, 2018 Mem. & Order Granting Gov't Mot. for Anonymous and Partially Sequestered Jury, Dkt. No. 187 at 2-3 (concluding that defendant's actions could pose risk of harm to cooperating witnesses). As the facts set forth herein provide ample support for the "specific, on the record findings" necessary to support partial sealing, Lugosch v. Pyramid Co., 435 F.3d 110, 120 (2d. Cir. 2006), the government respectfully requests that the Court permit the government to file this motion to limit cross-examination partially under seal. Should any order of the Court regarding this motion describe the sealed information in question with particularity, rather than

in general, the government likewise requests that those portions of the order be filed under seal.

Respectfully submitted,

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cc: Clerk of Court (BMC) (via ECF)
Defense Counsel (via Email)